Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

DOUGLAS J. TAUBE,
Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition For Writ of Certiorari
To The Appellate Court of The State of Illinois
Second Judicial District

PETITION FOR WRIT OF CERTIORARI

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Oral Argument Requested if Petition is Granted

QUESTIONS PRESENTED

I.

Where the trial Court forms it's own conditions of probation, do the terms of probation need to sufficiently inform the probationer of what non-criminal conduct is prohibited so as to avoid being impermissibly vague in violation of due process guarantees?

II.

In instances where the State's knowing use of contradictory testimony and the trial Courts overlooks and ignores the variations and contradictions between previously submitted written report to the Court at hearing on motions and testimony at trial on a material fact by the State's chief witness, sufficient to impeach witness credibility thereby forming basis for a denial of due process claim?

III.

Whether the State's failure to release reports from probation file containing exculpatory information to the defendant as ordered by the trial Court and the trial Court's failure to provide the probation file under subpoena and discovery rules at trial, rise to a level of a violation of due process guarantees?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Appellate Court of Illinois, Second District appears at Appendix A to the petition and is reported at People v. Taube, App. 2 Dist.1998, 234 Ill.Dec. 233, 299 Ill.App.3d 715, 702 N.E.2d 573.
The relevant, prior orders of the Appellate Court and Illinois Supreme Court are unreported but are included herein in Appendix B, C, D.

JURISDICTION

The opinion of the Illinois Appellate Court was filed on September 14, 1998. A copy of that decision appears at Appendix A. A timely petition for rehearing was thereafter denied on December 4, 1998, and a copy of the order denyiny rehearing appears at Appendix B. The Illinois Supreme Court denied Petitioner's timely Petition for Review of the Appellate Court's judgment on March 31, 1999. A copy of that decision appears at Appendix D.

The jurisdiction of this Court is invoked under :
28 U.S.C.§ 1257(a).

CONSTITUTIONAL AND STATUATORY PROVISIONS INVOLVED

U. S. Constitution, Amendment I:

"Congress shall make no law...abridging the freedom of speech"

U. S. Constitution, Amendment IV:

> "No person shall be...deprived of life liberty, or property without due process of law..."

U. S. Constitution, Amendment V:

> "nor shall any person...nor deprived of life, liberty, or property, without due process of law..."

U.S. Constitution, Amendment XIV:

"§ 1. ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without due process of law; nor deny to any person within its jurdiction the equal protection of the laws."

STATEMENT OF CASE

For purpose of this Petition references to the trial court record are denoted as "(C)" and references to the supplement record consisting of reports of proceedings are denoted as "(CR)".

In April of 1993, Douglas Taube contacted family therapist Cynthia Powers and reported his abuse of his two adopted children who then reported it to the authorities on April 9, 1993. (C 571). He was advised that the abuse would be reported pursuant to the Abused and Neglected Child Reporting Act and nevertheless kept his appointments. (C 571). He expressed a need for help and treatment for himself , the family, and his children. He commenced individual psychotherapy with Ms. Powers on an intensive basis, every 2 to 5 days. Ms. Powers felt that the defendant truly wanted to get help for himself and to change.(C 572-573). In June of 1993 counseling was transferred to James Gioia, PsyD. Mr. Taube was not served with warrant until February 14, 1994. Mr. Taube completed counseling with Dr. Gioia in November of 1994. Dr. Gioia progress report dated April 12, 1995 indicating treatment for the offense. (C 176). Even though he was not under any court order to do so, Mr. Taube started counseling with Russell Hoffman, MA. in November of 1994 (C 411) who was later approved by the court when he was sentenced.(C 56).

On January 12, 1995, pursuant to a plea agreement , Mr. Taube entered guilty pleas to two amended counts of criminal sexual assault in violation of Chapter 38, §12-13(a)(3), one count for each victim. Remaining counts were nolle prossed. (C51-52, C55-56, C63).

The Defendant was sentenced (C58) identically on each count as follows:

> "48 months probation; 9 months work release to begin 1/18/95 before 8:00 PM; obtain sexual offender evaluation and complete all counseling/treatment recommended by prob. dept.; continue current counseling w/Russ Hoffman-any counseling program must be for minimum 2 years; certify/register as child sex offender; DNA & HIV testing; no unsupervised contact with Paul or Alan-must be supervised by Mrs.

Taube, a probation officer, or counselor Susan Throne-Devin; visits only 2 nights/week, one day on weekend, visits must be pre-arranged with Mrs. Taube, pay costs of victim's counseling."

These same conditions were incorporated into the conditions of probation (App. G-1).

On March 9, 1995 Mr. Taube's probation was modified by agreement to allow additional visitation with his children consisting of an additional Saturday and Sunday per month for 6 hours each day in accord with his allowed work release furloughs, Mr. Taube to provide his ex-wife with 7 days prior notice. (C 67).

On June 1, 1995 a petition to revoke probation was filed and withdrawn by the State on the same day. (C 71 and C74). Also on June 1, 1995 the defendant's sentence was modified to reflect probation's referral to Dave Eubanks in place of Mr. Hoffman for counseling as follows:

"...The requirement that Mr. Taube continue in counseling with Mr. Hoffman is stricken.

The requirement that Mr. Taube obtain a sexual abuse offender evaluation and complete all counseling and treatment recommended by probation stands. ..." (C73).

Modifications were also made by agreement to reflect changes in work release, visitation supervisors, and school schedules:

"...Visitation with A.T. and P.T. allowed one weekend per month in accord with his furlough from work release.

Visitation shall be for a maximum of 4 hours on Saturday and a maximum of 4 hours on Sunday.

Visitation as previously ordered must be pre-arranged with Mrs. Taube regarding date, time, and places.

Visitation shall be supervised by either Mrs. Taube, a probation officer, counselor Susan Thorne-Devin, or Pastor John Westra.

Mr. Taube shall not call either boy on the phone.
All prior orders not in conflict shall remain in full force and effect..." (C 74).

On June 26, 1995, upon motion of Mr. Taube because of notice received from his employer to relocate Texas to maintain employment (C 80), his remaining work release was requested to be converted to straight time. (C 85). Mr. Taube was allowed to relocate to Texas for employment purposes and report back to probation every two months and probation was not to be transferred. (CR 108-109, CR 122-123). All previous orders remained in full force and effect. (C 85).

On February 9, 1996 a petition to revoke probation was filed by the State alleging that Mr. Taube was discharged from two different sex offender programs for non-compliance with treatment (C 91). This petition was withdrawn by the State without hearing on February 29, 1996 upon motion by the defendant (C 92-94) to dismiss for the State's non-compliance with Interstate Compact on transfer of probationers and demand for hearing on same. (CR 133).

On May 23, 1996 another petition to revoke probation was filed alleging that Mr. Taube failed to complete sexual offender evaluation as ordered on January 12, 1995 (C 101) even though Probation had received an evaluation from Mr. Eubanks a probation referred counselor in June of 1995. (C417). Further, Mr. Taube had already started another evaluation with Probation referral Patricia Porter on May 1, 1996. This petition to revoke was once again withdrawn by the State on June 6, 1996 (C 102). Additionally, on June 6, 1996 Mr. Taube's motion to allow transfer to Texas to continue his employment was denied. The order for counseling was modified to reflect individual and group sexual offender counseling and treatment with Patricia Porter for a minimum of two years pursuant to 730 ILCS 5/5-5-3(e)(1)(A) and visitation with his children was ordered to remain as stated in the order of June 5, 1995 on the condition that Mr. Taube remain in counseling/treatment approved by probation. (C 102).

On June 7, 1996, by agreement, Mr. Taube was allowed to travel to Texas for employment purposes, reside in Illinois for probation supervision and sex offender treatment with Patricia Porter, and maintain sex offender registration in both Illinois and Texas as he was doing. (C 103-104). Mr. Taube returned to his employer in Texas and was terminated on June 30, 1996.

Mr. Taube was still unemployed on October 17, 1996, therefore filed pro-se motions to require probation to pay costs of court ordered counseling (pursuant to probation rules), abate probation fees, impose a protective order, and allow him to interview and search for out of state employment. (C 106-155). These motions were prompted by notice received from Counselor Porter indicating that she was going to discontinue treatment for non-payment (CR 247). Additionally Mr. Taube received report from the Texas Employment Commission where employment manager reported that she was contacted by Mr. Taube's probation officer, Irene Nathe. (C 108). At the time, this caused his employer to search his divorce case, locate his criminal conviction which resulted in his termination. (C 114-115). He further alleged inability to locate employment in Illinois. (C 122-123) and that his ex-wife continues to express need for child support and maintenance. (C 146).

On November 4, 1996 Mr. Taube filed a pro-se motion for alternative counseling and reporting alleging that the only offered received for employment was in Fort Worth, Texas. He proposed alternate treatment in Texas by substituting Dr. David Stilson in place of group counseling and yet still continuing with Patricia Porter in person and by phone and report bi-monthly in person to probation. (C158-186).

On November 7, 1996 Mr. Taube's motion for alternative counseling and reporting was denied, his motion for protective order was denied, and the remaining motions were continued for hearing to November 19,1996. (C 211). The statements of Patricia Porter were reduced to writing and presented to the States attorney and the Court in the form of her November 6, 1996 treatment summary. (CR 236). Worthy of note, her report of November 6, 1996 contains the relevant statement that "...he has been cooperative with completing his assignments...". (C 558). ASA Guerin indicated that Pat Porter was willing to continue counseling

with him and she would switch counseling days. (CR 240). Mr. Taube stated that such a plan would require taking days off from work and Mr. Taube therefore indicated to the court that he could not pursue this employment due that fact. Mr. Taube next presented his motion for probation to pay cost of counseling as he had no other employment and Ms. Porter had indicated she was going to discontinue his counseling for non payment. (CR 247). The court directed probation to follow up on the financial affidavit Mr. Taube filed with them three months earlier (CR 247). The Court admonishes probation that "...if Ms. Porter wants to remain as an entity to which a probation department refers treatment, that some other arrangement is going to have to be made...". (CR 248). After court on that same day, Ms. Porter terminates counseling with Mr. Taube. (C 490-491).

On November 12, 1996 Mr. Taube filed a pro-se motion to reconsider alternative counseling and reporting. (C 187-210).

On November 19, 1996 a Petition to Revoke probation was filed alleging that Mr. Taube "...has failed to cooperate with and complete the sexual offender counseling and treatment recommended by the Probation Department...". (C 213). Also, on Mr. Taube's motion to reconsider, the court ordered probation to contact Dr. Stilson and determine his qualifications, the nature of his program, and the proposed outline of treatment for Mr. Taube. (C 212).

On November 20, 1996 Mr. Taube caused a subpoena to issue returnable on December 2, 1996 to be served upon the DuPage County Probation Department requesting "any and all documents of any kind, nature and description regarding Douglas Taube..." (C 222). On the same date he also served a subpoena upon Clinical Behavior Consultants; Attn.: Patricia Porter requesting the same documents and also returnable December 2, 1996. (C 224).

On December 2, 1996 the court ruled that the probation file is protected by statute and would not be released to the defendant. The court did direct the State to look through the entire probation file and insure that any documents relating to the allegations in the petition to revoke are tendered to the defendant forthwith. (CR 299-300). With respect to the subpoena directed to Patricia Porter the

court ordered that if she testifies, Mr. Taube is entitled to look at anything used to refresh recollection. (C 299).

Mr. Taube had not received response to his subpoena, so on January 6, 1997 he filed a pro-se motion to reconsider his subpoenas duces tecum of his probation records and records of Patricia Porter. (C 232-233). On the same date he also filed a motion to dismiss the petition to revoke his probation asserting that the conditions of his probation are unduly vague, overbroad, uncertain and do not state what conduct is prohibit (sic) and/or allowed. Additionally, no time limit in which to complete sex offender treatment is set forth. In, addition, he asserted that the petition to revoke his probation fails to allege in what manner he has failed to cooperate and he is therefore required to guess at what constitutes "failure to cooperate", thereby making the preparation of a defense impossible and violating the due process clauses of the State and Federal Constitutions. (C 227-228), (CR 314-317).

On January 9, 1997 the trial court again denied Mr. Taube's motion to view his probation file and ordered probation to supply Mr. Taube with a copy of all material from his probation file relevant to the petition to revoke now on file. In addition, Patricia Porter was ordered to tender a copy of her file on the defendant to the defendant within 3 weeks (C 240). The motion to dismiss was considered by the court as a motion for a bill of particulars. (CR 316- 317). The people were ordered to provide an answer to bill of particulars in relation to the petition to revoke and the defendant was given leave to file any motion in relation to this information by February 13, 1997. Hearing on the petition to revoke was set for February 27, 1997. (C 240).

On February 13, 1997 Mr. Taube filed a further pro-se motion to strike and dismiss the petition to revoke again asserting that the petition to revoke and the conditions of his probation are unduly vague, overbroad, uncertain and violative of Federal and State due process. He also asserted that the State failed to provide an answer to bill of particulars as ordered by the court on January 9, 1997. (C 242-243).

On February 27, 1997 the trial court entered an order holding that Pat Porter's file regarding the defendant and her

treatment/termination of him will stand as the People's response to defendant's request for a bill of particulars. (C 260).

On March 5, 1997, Zachary M. Bravos filed his appearance as attorney on behalf of Mr. Taube in these proceedings. (C 264).

On April 10, 1997 this matter proceeded to a hearing and the trial court found that the petition to revoke defendant's probation was proven. (C 268). Ms. Porter testified that she terminated Mr. Taube from her program for three reasons:

1. Maintaining an unacceptable level of "denial" regarding his abuse involving "minimization" and "projection". (CR 49).

2. He was continuing to attempt visitation with his children. (CR 364, 389).

3. Some of his assignments were not completed at all and others were partially completed. (CR 369).

Mr. Taube testified that he was presently enrolled with another DuPage County Probation approved counselor for sex offenders and as before, complied with all terms and conditions. (CR 433-434). Mr. Taube testified that to the best of his knowledge he complied with all the requirements of Patricia Porter and completed all assignments when due. (CR 426, CR 440). The treatment contract implemented by Patricia Porter specifically provided that Mr. Taube have prior notification as to when termination is being considered or will occur. (CR 465-466). Mr. Taube's treatment contract specifically provides that in the event of termination, the decision "...will be made in a reasonable and professional manner and will not be arbitrary or capricious and [Mr. Taube] will have prior notification as to when this is being considered or will occur. (C 272). Mr. Taube testified that at no time prior to his termination from treatment by Ms. Porter was he ever notified that he was not complying with any terms of treatment, that he was being considered for termination, that he was displaying an inappropriate level of denial, or advised to work on or modify behaviors because he was not in compliance with the program requirements. (CR 428-429).

Patricia Porter confirmed that at no time prior to terminating Mr. Taube from her program did she ever advise him that he was being considered for termination nor did she advise him of any deficiencies in his performance or what he needed to do to comply with the treatment program. (CR 394). She also confirmed that she mistakenly thought that it was part of Mr. Taube's treatment plan that he have no contact with his children. Mr. Taube's treatment plan did not contain such a provision. (CR 390). The court was supervising Mr. Taube's contact with his children and certain orders allowing such visitation were entered by the trial court. (C 56, C 8, C 67 and C 74).

The defendant also argued at hearing on April 10, 1997, that a finding of violation of probation in these circumstances constituted a denial of due process. (CR 403-404).

On May 20, 1997 the defendant filed a motion for additional discovery asserting that at the hearing on the petition to revoke, Patricia Porter testified that the defendant had failed to complete certain home work assignments, left others incomplete, and others were done sloppily and carelessly. (C 303). It was further asserted that at no time prior to the hearing of April 10, 1997 was it ever alleged, either in written materials provided through discovery or subpoena or orally, that the defendant's actions with regard to his home assignments were deficient, unacceptable, or problematic in any way. Mr. Taube sought treatment progress reports for the period August through September, 1996. (C 304).

On May 23, 1997 the court ordered the State to review Ms. Porter's file, compare it with what had been provided to Mr. Taube and segregate any documents not previously provided. (CR 492).

On June 3, 1997 the State filed a supplement; disclosure consisting of 2 pages of notes from Patricia Porter. (C 317).

On June 11, 1997 Mr. Taube filed a motion to strike the testimony of Ms. Porter, reconsider the finding of probation violation, and in the alternative for a new hearing. (C 322-500). The motion alleged that testimony by Ms. Porter at the hearing on April 10, 1997 regarding homework deficiencies was outside the bill of particulars filed by the State and should be stricken, that the testimony and evidence provided no basis for the violation of Mr. Taube's probation, and that a new hearing be had because of

deficiencies in the documents produced to the defendant. Further, defendant again asserted that a finding of violation of probation resulted in denial of constitutionally protected due process rights. (C 327).

On June 11, 1997 additional motions for new hearing and to strike the testimony of Ms Porter and reconsider finding were presented to the court. It was evident that there were significant inconsistencies in Ms. Porter's notes which would have been useful at the prior hearing. (CR511). Mr. Taube's motions to strike the testimony of Patricia Porter and to reconsider the finding of probation violation were denied. His motion for new hearing was considered as a motion to re-open the hearing and was granted for the purpose of further cross examination of Ms. Porter. (C 321).

On July 9, 1997 the probation violation hearing was reconvened and further cross-examination of Patricia Porter was had. Ms Porter testified that she destroyed her original notes, that everything she needed was in her November 6, 1996 treatment summary. (CR537-538).Ms. Porter additionally testified that she wrote new notes about 24-48 hours before she testified. (CR539, 549). She testified that her new notes indicate "cycle" incomplete. (C549). She testified that everything in those notes came from the file submitted to the court and memory. (CR539). Ms. Porter testifies that she agrees that her November 6, 1996 treatment summary indicates that "Mr. has been cooperative in completing his assignments". and that " there is no indication in there that any assignments are incomplete or that he failed to do two assignments" (CR 550). In summarizing, the Court stated that "he either didn't comply with what she asked him to do or he did so in a very superficial way and didn't confront his issues, never got through the denial phase of counseling". (CR 555). The court denied the motion to reconsider its finding of probation violation. (CR 556).

On July 23, 1997 a sentencing hearing was commenced and continued to September 19, 1997 pending receipt of a report from Mr. Taube's current therapist, Miss Runion. (CR 626). This hearing was subsequently continued to October 6, 1997 at which time Mr. Taube was re-sentenced on the charge of criminal sexual assault to a term of four years in the Illinois Department of

Corrections with credit for 180 days served. (C 622). Mr. Taube's motion for an appeal bond was denied. (C 623).

On October 9, 1997 Mr. Taube's motion to reconsider the sentence was denied as was his written motion for an appeal bond. (C 631).

On October 9, 1997 Mr. Taube field his notice of appeal. (C 630).

On October 23, 1997 and amend re-sentencing order nunc pro tunc to October 6, 1997 was entered without notice to counsel or defendant. It appears to be identical to the order of October 6, 1997. (C 642). On November 5, 1997 an amended notice of appeal was filed by Mr. Taube.

The defendant's brief was timely filed on January 20, 1998.

On appeal, the defendant raised the following issues: (1) whether the trial court correctly found a violation of probation; (2) whether defendant was denied due process of law, because the terms of the probation order were unconstitutionally vague and that nebulous concepts of "denial", "acceptance of responsibility", "showing remorse", etc. form no objective test of compliance; and (3) whether the sentence imposed following the revocation of probation was proper.

The State filed their response brief after requesting a 90 days extension which was granted by the court. The second district appellate court issued their opinion on September 14, 1998 affirming the judgment of the circuit court of DuPage County. The Appellate Court held that a defendant must "completely cooperate" and "actively participate" in a treatment program.(App. A-8). In reviewing the Appellate Court held that the defendant had failed to complete some assignments; was unable to form therapeutic relationship with the therapist and conditions of probation sufficiently informed defendant of terms and conditions to allow him to know was expected.

The defendant on September 22, 1998 filed pro-se motion for leave to enter appearance instanter, and motion for extension of time in filing reconsideration. His motion for 50 day extension for filing reconsideration alleged that he did not have adequate time to file within the 21 days for filing due to his incarceration and he had

limited access to the required legal material at the correctional center. Further claiming that the attorney of record was engaged out of state in other legal matters and that he did not have income to pay the attorney for his time anyway.

On December 4, 1998 leave was granted allowing Zachary Bravos to withdraw as counsel on appeal; leave was granted to defendant to appear and present Petition for Rehearing pro-se; and Petition for rehearing was considered and denied. December 16, 1998 the defendant filed pro-se in the Second District Appellate Court Affidavit of Intent to File Petition for Leave to Appeal to the Illinois Supreme Court. Timely Petition to Illinois Supreme court was filed January 26, 1999. Lastly, the Illinois Supreme court on March 31, 1999 denied his Petition for Leave to Appeal.

REASONS FOR GRANTING THE WRIT

Due process requires the same specificity and clarity in drafting ordinances and statutes as drafting the conditions of probation. The same standards should apply as for conditions of probation because of the potential severity in punishment if a violation of probation is proven.

A probation violation proceeding is not a criminal trial. However, due process must be accorded a defendant whose probation is sought to be revoked. People v. Acevedo, 216 Ill. App. 3d 195, 576 N.E.2d 949, 159 Ill. Dec. 1026(1991). The due process protection is, however, more limited. Morressey v. Brewer (1972), 408 U.S. 471, 481, 33L Ed. 2d 484, 494, 92 S.Ct. 2593, 2600; People v Beard (1974), 59 Ill. 2d 220, 225, 319 N.E. 2d 745, 747.

Various decisions have attempted to delineate the scope of due process afforded in probation violation matters. Thus it has been held that due process requires: (1) notification of the proceedings, (2) an opportunity to be heard, (3) The opportunity to present evidence and confront witness, (4) representation by counsel, (5) a fair determination that the acts upon which the probation violation is predicated actually took place, (6) Fairness through the duration of the proceeding. People v. Acevedo, 216 Ill. App. 3d 195, 576

N.E.2d 949, 159 Ill. Dec. 1206 (1991); People v. Allegri, 109 Ill. 2d 309, 487 N.E.2d 606, 93 Ill. Dec. 781 (1985); People v. White, 33 Ill. App. 3d 523, 528 (1975).

The precise boundaries of due process afforded litigants in probation violation proceedings are difficult to ascertain. However, a fair hearing must be conducted. The right to a fair hearing is an essential component of our justice system and will invariably be safeguarded by the courts. People v. Steele, 283 Ill App. 3d 413, 670 N.E.2d 757, 219 Ill. Dec. 79, (1st Dist. 1996).

A sentence of probation constitutes a form of agreement between the offender and the criminal justice system, and because of the severity of the consequences if the agreement is broken, it is important that their be a definite, memorialized understanding of what is required of the probationer. People v. Saucier, 221 Ill. App. 3d 287, 581 N.E.2d 852, 163 Ill. Dec. 698, (2nd Dist. (1991). People v. Brown, 137 Ill. App. 3d 453, 455 (1985). Where the court fashions its own discretionary conditions, the probation order or certificate must reasonably specify in writing what conduct is expected of the accused. Saucier, 221 Ill. App. 3d 287 at 292.

Here, the petition to revoke Mr. Taube's probation alleged that he "failed to cooperate with and complete the sexual offender counseling and treatment recommended by the probation department". Mr. Taube still had over two years on probation. At the beginning of probation, the defendant's probation officer waited over 5 months before referring defendant to probation approved counselor Dave Eubanks. (CR584). The terms of his probation do not specify when the program is to be completed. At the time of his probation violation hearing he was in a probation approved treatment program. (CR 433-434), and could have completed the program by the end of his probationary period.

Mr. Taube's probation was revoked because he was terminated from a treatment program (according to Ms. Porter) because of : 1. Maintaining an unacceptable level of "denial" regarding his abuse involving "minimization" and "projection". (CR 359); 2.He was continuing to attempt visitation with his children. (CR 364, 389); 3. Some of his assignments were not completed at all and others were partially completed. (CR 369). Such conduct was not required of Mr. Taube by the terms of his probation(App. E) or treatment

agreement (App. G) nor would a person reasonably understand that by the terms used in the probation certificate or treatment agreement.

Under the trial court's interpretation, a defendant can sincerely do all that is required of him but if in the subjective opinion of another he does not act with what would be interpreted with sufficient sincerity or gain sufficient insight or does not progress satisfactory or even complete a single written assignment at a undefined yet high enough grade level, his assignment could be evaluated as "sloppy" or "incomplete", his probation terminated and be sent to prison. Due process requires that an individual know objectively what is expected of him. He should know where the line is between what he may and what he may not do. Nebulous concepts of "denial", "acceptance of responsibility", "showing of remorse", "cooperate with", "actively participate", etc. form no objective test of compliance. To violate a defendant's probation upon nebulous, ill-defined concepts is violative of constitutional rights to due process. This is especially when the defendant is not advised that he is not taking appropriate steps to deal with the nebulous concepts at issue and not advise of what he needs to do in order to comply with the terms of his treatment plan. Every therapist except Ms. Porter indicated that Mr. Taube was not in denial, had taken responsibility for his actions and showed remorse. Even the professionals could not agree on interpretation.

To violate probation for being terminated from treatment program when that termination is based upon the subjective, secret opinions of treatment personnel leaves a defendant with no basis upon which to know that he is in violation of his probation, requires him to guess if he is in compliance, and affords no due process protection. The Appellate Court of Illinois Second District interprets this matter as only requiring that the defendant be given a certificate of probation but that it does not have to reasonably inform him of what is required to avoid a revocation. The order granting probation must contain all the conditions of the probation. People v. Einoder(1968), 238 N.E.2d 137.; People v. Susberry, 386 N.E. 2d 361. None of the conditions of probation for which the defendant was violated were included in the judgment order signed by the trial court. People v. Susberry, 386 N.E. 2d 361. If an order fails

to inform a defendant of the required and prohibited conduct, the failure to comply cannot support a petition to revoke. People v. Taube, App. 2 Dist.1998, 234 Ill. Dec. 233, 299 Ill. App. 3d 715, 702 N.E. 2d 573 citing Saucier, 221 Ill. App. 3d at 292.

I. THE CONDITIONS OF PROBATION ARE VOID FOR VAGUENESS.

City of Chicago v. Morales, Doc # 97-1121 cited, "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983); see also Grayned v. City of Rockford, 408 U.S. 104 (1972). These standards are not to be mechanically applied. Rather, "[t]he degree of vagueness that the Constitution tolerates — as well as the relative importance of fair notice and fair enforcement — depends in part on the nature of the enactment." Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982).

The factors that this Court has deemed relevant in making such determinations demand a high degree of specificity in the language of the laws. See id. at 455 U.S. at 498-99 (listing factors). Reno v. ACLU, Doc # 96-511. In the case at bar the focus is not on the narrow subject matter of criminal conduct but rather on the broad range of all conduct which a probationer engages in while on probation and it imposes criminal penalties (re-sentencing on original charge). The conditions of probation contains no scienter or mens rea requirement that may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.

Most importantly, the demand for clarity of language is great because the law threatens to inhibit the exercise of other constitutionally protected rights. Smith v. Goguen, 415 U.S. 566, 573 (1974); Hoffman Estates, 455 U.S. at 499. A loitering law of this type has "the potential for arbitrarily suppressing First Amendment liberties".

In assessing the nature of the conduct postscribed by the conditions of probation, this Court should consider the inherent conduct required on probation. While some of the conditions are more definite in their prohibition and more targeted to core criminal conduct, others prohibits only the amorphous act of what is considered "actively participating" or "cooperating", . It is, therefore, a prohibition reminiscent of the most primitive and sweeping of the "street-cleaning" laws of our nation's past. See John C. Jeffries, Legality, Vagueness, and the Construction of Penal Statutes, 71 Va. L. Rev. 189, 216 (1985) (noting the potential of Papachristou-type laws to be used as street-sweeping devices and their susceptibility to vagueness challenges). What is the acceptable level of participation and cooperation and how is it measured? How does one know when they have achieved an acceptable level of participation?

For over half a century, this Court has unequivocally disapproved, as unacceptably vague, statutory language because it effects broad and vague restrictions on persons. In Thornhill v. Alabama, 310 U.S. 88 (1940) the court struck down state law because "the words themselves have no ascertainable meaning either inherent or historical." (citing Lanzetta v. New Jersey, 306 U.S. 451, 453-455.) Id. at 100.

In Papachristou v. City of Jacksonville, 405 U.S. 156 (1972), the Court struck an ordinance down as void for vagueness, both in that it "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct was forbidden . . . and because it encourage[d] arbitrary and erratic arrests and convictions." Id. at 162 (citations omitted).

A. THE CONDITIONS OF PROBATION FAIL TO PROVIDE ADEQUATE NOTICE.

This Court has repeatedly struck down vague statutes because they fail to provide persons with proper notice of prohibited conduct. See Grayned v. City of Rockford, 408 U.S. 104, 108 & n. 3 (1972) ("Vague laws may trap the innocent by not providing fair warning.") (collecting cases); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

This Court's "fair warning" jurisprudence, of which the notice requirement of the vagueness doctrine is a "related manifestation," United States v. Lanier, 117 S. Ct. 1219, 1225 (1997), long ago recognized this relationship between vague statutory language and the unreasonable risk it imposes on people engaging in conduct they reasonably believe to be innocent. "The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid [citation omitted], may be as much of a trap for the innocent as the laws of Caligula." United States v. Cardiff, 344 U.S. 174, 176 (1952); see also Cramp v. Board of Pub. Instruction, 137 S.2d 828 (Fla. 1962). How language used be any more vague or totally lack meaning where in the case at bar the understanding is (App G) "13. I understand that I will be required to... report my behaviors and thoughts honestly and accurately ...." and then when the probationer reports his thoughts he is terminated from counseling.

This Court recently wrote that fair warning should be given "in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." Lanier, 117 S. Ct. at 1219, 1220 (quoting McBoyle v. United States, 283 U.S. 25, 27 (1931)). In the instant matter, the conditions of probation informs the probationer "of what the law intends to do" — revoke his probation. What it fails to do is define with clarity what "certain line is passed." Thus, the failure to provide notice prior to terminating counseling is, itself, a denial of fair warning.

"[T]he touchstone [of fair warning] is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time, that the defendant's conduct was criminal," Lanier, 117 S. Ct. at 1219-20, not that it was just displeasing. The conduct that is complained of in the instant case my be displeasing

Because the Certificate fails to describe the underlying conduct that it purports to prohibit in a manner that is understandable to a person of ordinary intelligence, it fails adequately to notify and is thus unconstitutionally vague.

B. VAGUE CONDITIONS OF PROBATION ENCOURAGE ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

"[T]he most important aspect of the vagueness doctrine is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement." Colander, 461 US at 358 (internal quotation and citation omitted). Where a criminal statute fails to provide such minimal guidelines, it "may permit a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." Id. (internal quotation and citation omitted). It furnishes a convenient tool for "'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" Papachristou, 405 U.S. at 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)). Similarly it is true for conditions of probation that lack specificity in terminology..

In Coates, an ordinance that subjected the right of assembly to the unascertainable standard of whether persons assembling on any sidewalk were "conduct[ing] themselves in a manner annoying to persons passing by" could not stand, in part because its violation could "entirely depend upon whether or not a policemen [was] annoyed." 402 U.S. at 614. Similarly, in Kolender, a criminal statute that required persons who loitered to provide "'credible and reliable' identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of Terry v. Ohio" was found to be vague. The statute, the Court held, "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect ha[d] satisfied the statute . . . ." 461 U.S. at 358. Like the ordinances in Coates and Kolender, in like fashion the conditions of probation provides no standards by which a probation officer can determine what conduct it prohibits, thus inviting discriminatory enforcement. The certificate for this reason as well, it is unconstitutionally vague.

II. THE CONDITIONS OF PROBATION I ARE SUBSTANTIALLY OVERBROAD.

The constitutional infirmity of overbroad legislation is that it sweeps protected activity within its proscription. Reno v. ACLU, Doc. # 96-511.

The Supreme Court in City of Chicago v. Morales, 177 Ill.2d, at 477, 687 N.E. 2d, at 59, recognized that in crafting an exceptionally broad ordinance, it could be used to sweep intolerable and objectionable gang members from the city streets. As the Supreme Court has observed, ordinances such as the gang loitering ordinance are drafted in an intentionally vague manner so that persons who are undesirable in the eyes of police and prosecutors can be convicted even though they are not chargeable with any other particular offense. Papachristou, 405 U.S. at 166, 31 L. Ed. 2d at 118, 92 S. Ct. at 845. Laws such as these tend "to be invoked only where there is no other valid basis for arresting an objectionable or suspicious person. The opportunity for abuse *** is self-evident." Lewis, 415 U.S. at 136, 39 L. Ed. 2d at 221, 94 S. Ct. at 974 (Powell, J., concurring). In the case at bar, the conditions of probation touch on the constitutionally protected first amendment rights of freedom of speech and the Illinois Religious Freedom Restoration Act (735 ILCS 35). Where the conduct is within the allowable limits of free speech, to seek termination of a probationer's probation on the grounds that they exercised freedom of speech and religion in a counseling setting through expressing their personal beliefs and objections to perverse materials violates protected rights. Niemotoko v. Maryland, 340 U.S. 268 (1951).

WITHHOLDING EVIDENCE THAT IS DEMONSTRATIVELY RELEVANT IN A CRIMINAL TRIAL CUTS DEEPLY INTO THE GUARANTEE OF DUE PROCESS.

The defendant on two occasions subpoena the probation file for evidence to support his theory of defense. The Courts denial prejudiced the defendant and was due process violation. Further the testimony of Irene Nathe at the sentencing hearing indicates that her

file contained many notes which were not provided to the defendant under subpoena. Ms. Nathe specifically remembers receiving numerous progress reports from Patricia Porter during the time that the defendant was in treatment with her. (CR 592-594). Only one such report was ever given to the defendant, and the defendant requested additional discovery. (C303-311). The trial court denial of the defendant's subpoena of the probation file which did and would contain records to cross examination of the witness. The court alleged exemption over the defendant's objections. (CR297-301, CR 310-313). Privileges are designed to protect interests which are outside of the truth seeking process and thus privileges must be strictly construed as exception to general duty to disclose. Mere existence of exceptions to freedom of information Act (FOIA) are not dispositive of discovery request. (5 U.S.C.A. § 552; S.H.A. ch. 116, #201 et seq.). Once the privilege is recognized, the case law on investigation files privilege is clear that a minimum showing is required before the court must balance the interests. The party seeking to invoke the privilege bears the burden of justifying its application. The criteria which should be weighted in any such determination have been effectively reduced to a list of ten factors. IN RE Marriage of Daniels 180 Ill. Dec. 742, 607 N.E.2d 1255(Ill. App. 1 dist 1992) citing Frankenhauser v. Rizzo (E.D.Pa 1973), 59 F.R.D. 339, 344. The allowance of the privilege to withhold evidence that is demonstratively relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basis function of the court. U.S. v. Nixon, 94 S.Ct. 3090 (1974); People v. Steidl, 685 N.E.2d 1335 (1997). In Brady the request was specific, it gave the prosecution notice of exactly what the defense desired. Although there is of course, no duty to provide to defense counsel with unlimited discovery of everything know by the prosecutor, if the subject matter of such a request is material or indeed if a substantial basis for claiming material exists, it is reasonable to require the prosecutor to respond by furnishing the information. When the prosecutor receives a specific and relevant request the failure to make any response is seldom, if ever excusable. U.S. v. Arurs, 96 S.Ct. 2392 (1976). Due process requires disclosure of evidence which impeaches credibility of key prosecution witness, U.S.C.A. Const. Amend. 5, 14. In RE U.S. v. Bastanipour, 41 F 3d 1178 (1994). Due process obligates the State to disclose to the

defense counsel any material or information within its possession or control which tends to negate guilt of the accused as to offense charged. U.S.C.A. Amend. 5 and 14, S.Ct. rule 412(c). People v. Preaity, 627 N.E.2d 1196 (1994); State v. IM RECJ, 629 N.E.2d 579; C.J. v. Illinois, 116 S.Ct. 527. Information contained in probation file was relevant to witness credibility and would have permitted cross examination of witness. Defendant has due process right to material in probation file that bears on credibility of significant witness. U.S.C.A. Const. Amends 5, 14. U.S. v. Strifler, 851 F.2d 1197 (9th Cir. 1988). The trial Court's denial of the defendant's subpoena of the probation file was a denial of due process.

ATTACK ON CREDITABILITY OF WITNESS MAY BE ACCOMPLISHED BY IMPEACHING WITNESS WITH EVIDENCE OF PRIOR INCONSISTENT OUT OF COURT STATEMENT.

The testimony of Ms. Porter is equivocal at best. She testified that two homework assignments were missed. (CR 374-375). However, Mr. Taube testified that to the best of his knowledge he complied with all requirements of Patricia Porter and completed all assignments when due. (CR 426, CR 440). The notes that Ms. Porter made regarding the two supposedly missed assignments were not made until shortly before she testified on April 10, 1997, almost a year after the events. (CR 539). She destroyed her actual sessions shortly after she terminated the defendant from her program. (CR 537-538). Further, on May 23, 1997 the State informed the court that it had reviewed Mr. Taube's entire probation file and there was absolutely nothing in it to indicate any deficiency in his homework assignments. (CR 486-487). On July 9, 1997, during the re-opened cross examination, Ms. Porter first disclosed a treatment summary dated November 6, 1996 in spite of prior orders that her entire file be given to Mr. Taube. (CR 539-540). In this report, authored the day before the defendant was inexplicably terminated from treatment, she indicates that the defendant was cooperative in completing his assignments and there was no indication that any

assignments were incomplete or not done. (CR 550). This testimony on homework of Ms. Porter was on a material fact, a measure of participation in her treatment program, which forms the only objective measure of the defendant's cooperation and was directly contradictory to her testimony. Flat contradiction between the "witness" testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at trial or a contrast in emphasis upon the same facts, even a difference of order or treatment are also relevant to the cross examination process of testing the credibility of a witness trial testimony. Pennsylvania v. Ritchie(1987), 107 S.Ct. 989. Attack on creditability of witness may be accomplished by impeaching witness with evidence or prior out of court statement, S.Ct. rule 238(e). Further, Ms. Porter was under obligation of probation rule for treatment providers which required her to submit at least quarterly reports to probation. The requirements provide:

> 13. Minimally, quarterly reports shall be submitted to the supervising probation officer documenting attendance, homework completion, attitude, progress in treatment, future treatment plans and current payment status. (C 339).

If the defendant had truly failed to cooperate in completing the two homework assignments as Ms. Porter alleged, she had numerous opportunities to report the alleged lack of cooperation and she was required to do so by probation rule. The rule applicable to impeachment by proof of failure to state a fact on a prior occasion is that the omission of a witness to state a particular fact under circumstances rendering it incumbent upon him to, or likely that he would, state such a fact, if true, may be shown to discredit his testimony as such fact. People v. McKinney, 193 Ill. App. 3d 1012, 140 Ill. Dec. 719, 550 N.E. 2d 604 (4 Dist.), cert. denied, 132 Ill. 2d 551, 144 Ill. Dec. 263, 555 N.E. 2d 382(1990). Ms. Porter never made a record of any deficiencies in the defendants written assignments, she never informed the defendant of any deficiencies and the notes she presented at trial only indicated that only one homework assignment was incomplete,

contradictory to her testimony at trial and her treatment summary of November 6, 1996.

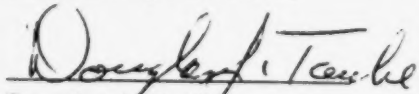
CONCLUSION

This case presents issues of lifelong importance, and considerable urgency for probationers, probation departments and society. The issues are fundamental to the decisions reached in this area. It is therefore urgent that this Court reach a decision on these matters at this time.

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Illinois Appellate Court Second District.

Dated: June 28, 1999

Respectfully submitted,



Douglas J. Taube

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

DOUGLAS J. TAUBE,
Petitioner

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of Illinois
Second Appellate District

APPENDIX

No. 3--97--0810

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DOUGLAS J. TAUBE, Defendant-Appellant.	Appeal from the Circuit Court of Du Page County. No. 93--CF--2325 Honorable Ann Brackley Jorgensen, Judge, Presiding.

JUSTICE RAPP delivered the opinion of the court:

Defendant, Douglas J. Taube, appeals from a finding of a violation of probation under section 5--6--4 of the Unified Code of Corrections (Corrections Code) (730 ILCS 5/5--6--4 (West 1996)) and a sentence of four years in the Department of Corrections. The trial court denied defendant's motions to reconsider both the finding of a violation and the sentence.

On January 12, 1995, defendant pled guilty to two counts of criminal sexual assault in violation of section 12--13 of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12--13 (West 1996)). The victims of these offenses were defendant's two adopted sons, P.T., age 10, and A.T., age 8. Defendant had been charged in a five-count indictment. The indictment included three counts of aggravated criminal sexual assault, in violation of section 12--14(b)(1) of the Criminal Code (720 ILCS 5/12--14(b)(i) (West 1996)), a Class X felony. The indictment also included two counts of aggravated criminal sexual abuse, in violation of section 12--16(b) of the Criminal Code (720 ILCS 5/12--16(b) (West 1996)), a Class 2 felony. Following a plea agreement, the State amended two of the counts to criminal sexual assault, a Class 1 felony. The remaining counts were nol-prossed and dismissed.

The trial court advised defendant that, pursuant to section 5--5--3(c)(2)(H) of the Corrections Code (730 ILCS 5/5--5--3(c)(2)(H) (West 1996)) he was not eligible for the probation proposed unless he agreed to accept, as a condition of probation, the counseling

provisions of section 5--5--3(e) of the Corrections Code (730 ILCS 5/5--5--3(e) (West 1997)).

Section 5--5--3(e)(1) of the Corrections Code provides in pertinent part:

> "In cases where prosecution for criminal sexual assault or aggravated criminal sexual abuse under Section 12--13 or 12--16 of the Criminal Code of 1961 results in conviction of a defendant who was a family member of the victim at the time of the commission of the offense, the court shall consider the safety and welfare of the victim and may impose a sentence of probation only where:
>
> (1) the court finds (A) or (B) or both are appropriate:
>
> (A) the defendant is willing to undergo a court approved counseling program for a minimum duration of 2 years; or
>
> (B) the defendant is willing to participate in a court approved plan including but not limited to the defendant's:
>
> (i) removal from the household;
>
> (ii) restricted contact with the victim;
>
> (iii) continued financial support of the family;
>
> (iv) restitution for harm done to the victim; and
>
> (v) compliance with any other measures that the court may deem appropriate[.]"

730 ILCS 5/5--5--3(e)(1) (West 1996).

The defendant indicated he understood these provisions and agreed to abide by them as a condition of his sentence of probation. Probation was granted, concurrent on each count, and the order specifically provided the following special terms which are applicable to the issues raised in this appeal:

> "48 months probation; 9 months of work release; obtain a sexual offender evaluation and complete all counseling & treatment recommended by Prob Dept. [*sic*]; ***; any counseling program must be for a minimum of 2 years; ***; no unsupervised contact with [the victims] ***; pay costs of any counseling for the victims."

In the 27-month period between January 12, 1995, the date of sentencing, and April 10, 1997, the date of the hearing on the petition to revoke probation, defendant appeared before the court on 16 separate occasions. These appearances were required by defendant's multiple attempts to modify the terms of his probation and the State's attempts to enforce the original provisions.

The trial court allowed defendant, first, to travel to Texas temporarily, as required by his employment and, later, to relocate to Texas for a permanent job transfer. During this period, the State filed a petition to revoke probation based on visitation violations and noncompliance with the order of probation. In June 1995, the trial court allowed defendant to complete his jail sentence by serving straight time, with day-for-day credit, and to continue his counseling in Texas contingent on probation department approval. In January 1996, the probation department reported that it would not approve counseling in Texas because defendant had been discharged from two programs in Texas for failure to abide by the requirements adopted for his rehabilitation. On June 6, 1996, defendant had returned to Illinois, and the State withdrew its petition to revoke contingent on defendant's completion of an evaluation in Illinois. The trial court directed defendant to begin counseling with Pat Porter, a therapist specializing in treating sexual offenders.

On November 7, 1996, the trial court held a hearing on defendant's pro se motions to modify the terms of his probation to allow alternative counseling. Defendant alleged he was being treated by his own counselors and that, therefore, it was unnecessary for him to continue with the court ordered counseling. On the same day, Porter discharged defendant from the treatment program. After defendant's motion was denied, he filed a motion to reconsider and various other motions. On November 19, 1996, the State filed the petition to revoke probation, which is the subject of this appeal, alleging defendant had failed to complete counseling as required. In response, defendant filed a pro se motion which the trial court interpreted as a request for a bill of particulars. The State replied by forwarding a copy of defendant's treatment file as maintained by Pat Porter.

On April 10, 1997, the trial court held a hearing on the State's petition to revoke probation.

The State called Pat Porter, the therapist to whom defendant had been referred for evaluation and treatment. She testified that defendant was evaluated in March 1996, that he objected to certain tests given, and that he was evaluated as a moderate risk to reoffend. She testified that defendant's treatment started in June 1996. Defendant attended the individual counseling and all but one of the group sessions. According to Ms. Porter, defendant was angry and felt that he did not need treatment. He objected to certain procedures and claimed it was an excessive burden to comply. She stated that defendant did not deny the commission of the offenses but insisted that his motive was to satisfy the requests of his adopted sons. He saw himself as a victim of the children, his ex-wife, and the court system. She testified that defendant failed to complete some of the required homework assignments and that others were only partially completed. Defendant also objected to several questions on religious grounds. She testified that defendant failed to see the usefulness of group sessions, objected to discussions of sexual matters, other than sexual abuse of his children, and felt that group therapy was irrelevant and unnecessary for him. She further stated that in her opinion defendant was in denial, that he showed no remorse or reflection on the harm to his sons, and that he wanted the victims to take responsibility for the abuse.

Porter testified she had originally planned a period of six to eight months for defendant to settle into treatment. She testified that on November 7, 1996, however, she decided to terminate the defendant because he had not benefited from the treatment.

On cross-examination, Porter admitted that, only one day prior to terminating his treatment, she told defendant she would be willing to continue treatment. She also admitted that she had never informed defendant before the termination that he had failed to cooperate in treatment. She further testified that she had discussed with defendant his concerns about the form of treatment proposed by the two providers in Texas. She was shown completed copies of two disputed homework assignments. But she denied having seen them prior the hearing. Defense counsel also questioned Ms. Porter

regarding the ethical duties and treatment methods used by the Texas treatment programs.

Defendant called three witnesses: James Goia, a licensed clinical psychologist; Russell Hoffman, a therapist; and David Eubanks, a therapist.

James Goia testified he had treated defendant in 1993 and 1994 for an adjustment disorder with depressed mood. He testified that he had found defendant cooperative and sincere in seeking treatment. He further stated that defendant was able to accept responsibility for his actions. On cross-examination, Goia admitted that he had not treated defendant for any criminal acts he might have committed and that the actions he referred to included seeking treatment and maintaining consistent attendance at those sessions.

Russell Hoffman testified that he had treated defendant beginning in 1994 for career stress, divorce adjustment, and the sexual offenses. He further testified that in his opinion defendant was not in denial and had been cooperative in therapy. On cross-examination, Hoffman admitted that he had not seen defendant for some time and had only recently resumed treating defendant.

David Eubanks testified he had been defendant's therapist for two months in 1995. He indicated that defendant did not deny commissions of the offenses and he found defendant to be a candidate for treatment. On cross-examination, Eubanks testified that defendant had been referred to him by the probation department for evaluation. But he admitted he did not treat defendant because the probation department was unsatisfied with the proposed treatment plan. He also stated that in his opinion he could have worked effectively with defendant, but defendant relocated to Texas before a treatment plan acceptable to the probation department could be prepared.

Defendant testified on his own behalf. Defendant stated that he was not in denial. He complained that Pat Porter failed to tell him that he was not complying with treatment. He stated that he had only objected to one assignment, because it contained definitions of deviant sex acts he had not committed and which he felt were irrelevant to his treatment. He also contended that he cooperated with the programs in Texas. Defendant, however, stated that he had

refused to participate in some of the suggested therapies, because he felt they were unusual and inappropriate.

Following the April 10, 1997, hearing, the trial court found the petition to revoke had been "proven" and set a date for re-sentencing. On June 11, 1997, defendant filed a motion to strike the testimony of Pat Porter regarding homework assignments, alleging certain notes were missing from the discovery materials provided to defendant. Defendant also filed a motion to reconsider and in the alternative a motion for rehearing. The trial court denied defendant's motion to reconsider and motion for rehearing but reopened the proofs to allow further cross-examination of Pat Porter. Additional testimony was heard on July 9, 1997.

On July 23, after hearing additional cross-examination of Pat Porter, the trial court again found that defendant had violated the terms of his probation, revoked his probation, and set a date for resentencing. On October 6, 1997, the trial court sentenced defendant to four years imprisonment in the Department of Corrections with credit for time served. Defendant's motion to reconsider the sentence was denied. Defendant timely appealed.

On appeal, the defendant raises the following issues: (1) whether the trial court correctly found a violation of probation; (2) whether defendant was denied due process of law, because the terms of the probation order were unconstitutionally vague; and (3) whether the sentence imposed following the revocation of probation was proper.

Section 5--6--4(c) of the Corrections Code requires the State to establish by a preponderance of the evidence that a defendant violated a condition of his probation. 730 ILCS 5/5--6--4(c) (West 1996); see also People v. Crowell, 53 Ill. 2d 447, 451 (1973); People v. Strickland, 211 Ill. App. 3d 183, 189 (1991). The determination to terminate probation rests within the discretion of the trial court, and, unless the determination was against the manifest weight of the evidence, an appellate court will not disturb the trial court's ruling. People v. Salamon, 126 Ill. App. 3d 1066, 1070 (1984). The decision to terminate probation is not per se against the manifest weight of the evidence simply because there is a conflict in the evidence. People v. Prusak, 200 Ill. App. 3d 146, 149 (1990) citing Salamon, 126 Ill. App. 3d at 1070.

Defendant argues that the decision of the trial court was contrary to the manifest weight of the evidence and relies heavily on our decision in People v. Prusak. Prusak stands for the proposition that probation cannot be revoked simply because a defendant has failed to benefit from fulfilling the conditions imposed. Prusak, 200 Ill. App. 3d at 150. We disagree with defendant's assertion that the facts of his case fall within the bounds of our decision in Prusak.

In Prusak, the State attempted to revoke the probation of a sex offender, because the treating clinic discharged him prior to completion of his treatment. Prusak, 200 Ill. App. 3d at 148. As a condition of his probation, Prusak had been ordered to cooperate with any treatment recommendation made by the Sinnissippi Mental Health Center. Prusak, 200 Ill. App. 3d at 147. The clinical supervisor evaluated the defendant and recommended that he attend weekly meetings of the center's sexual offenders group. Prusak, 200 Ill. App. 3d at 147. After attending these weekly meetings for approximately five months, Prusak was asked to leave the group because of his continued persistence that he did not remember having inappropriate sexual contact with his daughter. Prusak, 200 Ill. App. 3d at 147-48. The clinical supervisor testified that Prusak's denials had become disruptive to the group. Prusak, 200 Ill. App. 3d at 148. The record, however, revealed that Prusak also had physical ailments that affected his mental capabilities, including his memory. Prusak, 200 Ill. App. 3d at 150.

The trial court, in Prusak, held that the defendant " 'followed the letter of the order,' " but not " 'the spirit of the order of probation.' " Prusak, 200 Ill. App. 3d at 149. We reversed and held:

> "Simply because Prusak did not benefit from fulfilling the condition imposed upon his probation does not mean that he did not satisfy the condition. The trial court improperly interpreted the condition of probation to mean that not only did Prusak have to undergo treatment, but he was also required to be 'cured.' " Prusak, 200 Ill. App. 3d at 150.

In this case, however, Taube has not simply failed to benefit from the proposed treatment; he has failed to cooperate in his treatment. Ms. Porter testified that defendant failed to return some homework assignments and failed to fully complete others. She also testified that he was angry and blamed the probation department

and the courts for his problems. Ms. Porter was unable to form a therapeutic relationship with defendant. Defendant points to the testimony of his other therapists and suggests that he was capable of forming a therapeutic relationship with them. He concludes, therefore, that the failure to succeed in treatment with Ms. Porter was not his fault. We do not agree. This is simply additional evidence that any problems defendant encountered with Ms. Porter arose from his reluctance to proceed with court ordered treatment and his desire to choose his own form of therapy. Therefore, we determine that the trial court's finding of a probation violation was not against the manifest weight of the evidence.

This finding is not, as defendant suggests, contrary to our ruling in Prusak. In Prusak, we held that a court can order a defendant to undergo treatment but cannot order him to be "cured". Prusak, 200 Ill. App. 3d at 150. This court, however, has been reluctant to expand the application of Prusak. See People v. McGuire, 216 Ill. App. 3d 705, 709 (1991) ("We find Prusak substantially limited to its unique facts"). The case sub judice highlights an important limitation to our holding in Prusak. Although a court cannot order a sex offender to be successfully treated, a defendant ordered to undergo treatment must actively participate and cannot refuse to participate in his own treatment simply because he disagrees with the methods used. A defendant on probation must comply with court ordered treatment, and his personal opinion regarding the need for treatment is irrelevant. People v. Bell, 219 Ill. App. 3d 264, 267 (1991). Our holding in Prusak protects only those offenders who have honestly, sincerely, and completely cooperated in a treatment program, yet have nonetheless failed to recover. It does not, as in this case, provide a shield for those offenders who object to the treatment ordered by the court and refuse to cooperate fully.

Defendant also argues that he was denied due process because the terms used were so vague that he could not understand the requirements of his probation. He complains that the phrase "failed to cooperate with and complete the sex offender counseling and treatment recommended by the probation department" is vague and that the order of probation fails to specify in writing what is expected of him.

Although the defendant in a probation revocation hearing is not entitled to all the procedural safeguards provided a defendant initially standing trial, due process requires a fair determination that the acts forming the basis for revocation did occur. People v. Cox, 197 Ill. App. 3d 239, 243 (1990). A probation order must clearly notify a defendant what is required of him and what is prohibited. People v. Saucier, 221 Ill. App. 3d 287, 292 (1991). If an order fails to inform a defendant of the required and prohibited conduct, the failure to comply cannot support a petition to revoke. Saucier, 221 Ill. App. 3d at 292.

Here, we do not find that the probation order was unconstitutionally vague. We find nothing vague in the phrase "cooperate with and complete the sex offender counseling and treatment." The ultimate question, therefore, becomes whether Ms. Porter sufficiently informed defendant of the terms and conditions of his treatment to allow him to know what was expected. Ms. Porter testified that she informed defendant that among other things he was required to complete the homework assignments. She also presented the court with a detailed agreement for treatment, which bore defendant's signature. She testified that despite these instructions defendant was not cooperating with his treatment. Defendant, on the other hand, testified that he was not aware of the requirements. This issue, therefore, turns on the credibility of the witnesses regarding defendant's knowledge of the requirements of his treatment. The question of the credibility of the witnesses is an issue reserved for the trial court, and we will not substitute our own judgment on appeal. See, e.g., People v. Jarvis, 158 Ill. App. 3d 415, 425 (1987). In its ruling, the trial court implicitly accepted the testimony of Ms. Porter. Therefore, because we accept the trial court's finding of fact that defendant was aware of the conditions of his treatment, we must reject any claim that defendant was deprived of due process.

Defendant also alleges that he was denied due process because the petition to revoke did not adequately inform him of the alleged violation. We disagree. Upon defendant's motion, the contents of his evaluation and treatment file maintained by Ms. Porter were revealed to defendant. Moreover, when defendant disputed the contents of the file, the trial court reopened the proofs to allow

additional discovery and further cross-examination of Ms. Porter. The relevant portions of the probation department's file were also disclosed to defendant. Although defendant complains of a "secret opinion of treatment personnel," the record reflects that defendant was supplied with sufficient information to prepare his defense. The fact that a professional opinion was offered by Ms. Porter without prior consultation with defendant is not in itself a denial of due process.

Finally, defendant argues that the sentence imposed was an abuse of discretion. Sentencing is a matter in the sound discretion of the trial court, and a sentence will be overturned only if it is an abuse of that discretion. People v. Banks, 260 Ill. App. 3d 464, 473 (1994). The court may consider a number of factors including the nature of the crime and the defendant's potential for rehabilitation. See Banks, 260 Ill. App. 3d at 474. Moreover, the manner in which a defendant conducts himself while on probation may be considered to determine rehabilitation potential. People v. Walsh, 273 Ill. App. 3d 453, 460 (1995).

The trial court imposed a sentence of four years' imprisonment in the Department of Corrections with credit for time served in the county jail. This was the minimum term of incarceration mandated for a Class 1 felony. 730 ILCS 5/5--8--1 (a)(4) (West 1996). The trial court's determination that defendant's rehabilitative potential was exhausted was not contrary to the manifest weight of the evidence. The record is replete with admonishments to defendant of his need for proper evaluation and treatment. Defendant's probation was not revoked until after he had been unsuccessfully discharged from three separate treatment programs. Although defendant complains that he was not allowed the recommended six to eight months to complete treatment, he ignores the fact that because of his own agenda, the evaluation and treatment that was required during the first two years of his four-year probation did not even begin until 15 months of probation had passed. Moreover, the presentencing report reveals that defendant felt that the court ordered therapists were liars who had falsified his records. Given defendant's failure to successfully complete any of the three treatment programs he had started, and his clear animosity toward

the court and the probation department, it is highly unlikely that he would successfully complete any court ordered counseling.

Therefore, we find that the sentence imposed following the violation of probation was proper and was not an abuse of discretion.

For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.

McLAREN and HUTCHINSON, JJ., concur.

SEAL

STATE OF ILLINOIS APPELLATE COURT
SECOND DISTRICT

Office of the Clerk
847/695-3750
847/695-0092 TDD

Appellate Court Building
55 North Street
Elgin, Illinois
60120-5508

Appeal from the circuit Court of County of DuPage

Trial court No.: 93CF2325

THE COURT HAS THIS DAY , 12/04/98, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 3-97-0810
People v. Taube, Douglas, J.

Leave granted to Zachary M. Bravos to withdraw as counsel on appeal; Upon consideration, leave granted to defendant Taube to appear and present Petition for Rehearing pro-se; Petition for Rehearing considered and denied.
(Rapp, McLaren, Hutchinson, JJ.)

Loren J. Strotz
Clerk

cc: Zachary M. Bravos
Honorable Joseph E. Birkett
Martin P. Moltz, Deputy Director
Anthony J. Peraica

SEAL

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

Juleann Hornyak
Clerk of the Court
(217) 782-2035
Telecom Device
for the deaf
(217) 524-8132

January 26, 1999

First District office
29th Floor
160 N. LaSalle St.
Chicago, IL. 60601
(312) 793-1332
Telecom Device
for the deaf
(312) 793-1333

Mr. Douglas J. Taube
P.O. Box 87553
Carol Stream, IL. 60188

THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 86889 - People State of Illinois, respondent, v. Douglas J. Taube, petitioner.

Motion by petitioner for leave to file petition for leave to appeal instanter in excess of the page limitation but not exceeding 21 typewritten pages. Motion allowed.

cc: Hon. Jim Ryan
State's Attorney DuPage County
State's Attorneys App. Pros. Elgin

ILLINOIS SUPREME COURT
Juleann Hornyak, CLERK
Supreme Court Building
86889 Springfield, Illinois 62701
(217) 782-2035

March 31, 1999

Mr. Douglas J. Taube
P.O. Box 87553
Carol Stream, IL. 60188

No. 86889 - People State of Illinois, respondent, v. Douglas J. Taube, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 22, 1999.

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT DU PAGE COUNTY, WHEATON, ILLINOIS

	)	FILED
PEOPLE OF THE STATE OF ILLINOIS,	)	95Jan 12 AM 11:18
Plaintiff,	)	
	)	Case Number
-vs.-	)	93 CF 2325
	)	
DOUGLAS J. TAUBE,	)	
Defendant,	)	

You have been granted the privilege of probation. If you fail to obey the following conditions, your probation may be modified or revoked, if revoked, you can be resentenced on the offense for which you received probation.

CONDITIONS OF PROBATION

1. Obey all State, Federal laws and local ordinances.
2. Immediately notify your probation officer if arrested for any reason.
3. Report in person to your probation officer as frequently as directed and permit your probation officer to visit you in your home or elsewhere.
4. Reply promptly to ant communication from your probation officer.
5. Inform your probation officer in writing, within 7 days, of any changes of employment or place of residence
6. Do not leave the State of Illinois without giving advance notice to and obtaining written permission from your probation officer.
7. Cooperate and be truthful with your probation officer in all maters.
8. Appear before the court in person as directed by your probation officer or the Court.
9. Work at a lawful occupation, and/or further your education, and support your dependents.
10. Refrain from possessing a firearm or other dangerous weapon.

11. Pay a probation fee of $25.00 or $___each month. waived during periodic imprisonment.

12. Pay all costs, fees, fines and restitution in full not less than 60 days before the end of probation in equal monthly installments.

13. Promptly undertake urinalysis testing, and evaluation(including but not limited to substance abuse and psychological) as determined appropriate by the probation department and thereafter complete such treatment, therapy, counseling and/or remedial education as ordered by the probation department. Refusal to participate, or withdrawal or discharge from any of the above programs, will be considered a violation of probation and will be reported to the Court.

Complete___hours of public service as arranged through the probation department.

Report to the Court on ___at__ M., in Room___ for___.

Make a final report to the Court on 1/12/99 at (:00 AM., as directed by your probation officer.

"48 months probation; 9 months work release to begin 1/18/95 before 8:00 PM; obtain sexual offender evaluation and complete all counseling/treatment recommended by prob. dept.; continue current counseling w/Russ Hoffman-any counseling program must be for minimum 2 years; certify/register as child sex offender; DNA & HIV testing; no unsupervised contact with Paul or Alan-must be supervised by Mrs. Taube, a probation officer, or counselor Susan Throne-Devin; visits only 2 nights/week, one day on weekend, visits must be pre-arranged with Mrs. Taube, pay costs of victim's counseling."

Date:_____ Enter___/S/ Jorgensen_____
Judge

Date:_____ Signed:_____
Defendant

****

(to be completed by defendant and probation officer)

_____
Defendant

_____ _____
Date Probation Officer

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT DU PAGE COUNTY, WHEATON, ILLINOIS

	)	NO. 93 CF 2325
PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff,	)	FILED
	)	97 Oct 6PM 3:58
-vs.-	)	
	)	DCN.#_____
DOUGLAS J. TAUBE,	)	
Defendant,	)	X Resentence

PLEA: NOT GUILTY; FINDING OF GUILTY BY: COURT

It is hereby ordered that the defendant is sentenced as follows:

RE-

TYPE OF SENTENCE

Fined Total Amount $ X

X Fined $ 0 plus statutory court cost and fees and the following penalties:

X criminal surcharge X Court sentence monitoring program

X driver's education fund X violent crime victim assistance

X Illinois Department of Corrections 4 years-credit 180 days previously served.

SENTENCE

Upon a finding by the Court that defendant has violated his probation after a full hearing, probation is revoked and defendant is re-sentenced for the class 1 felony of ,criminal sexual assault, he is re-sentenced as follows:

defendant to serve 4 years Illinois Department of Corrections with credit for 180 days previously served.

State's attorney /S/ Harry Smith JUDGE: /S/ Jorgensen

Defense attorney /S/ Bravos Date: 10-6-97

Deputy Clerk /S/ Tom

Reporter /S/ Ernie

Bailiff /S/ Barb

Individual Treatment Agreement
Consent To Treat
Patricia E. Porter M.S.

I, Douglas Taube, have been offered entry, as a candidate, into treatment with Patricia E. Porter. Porter has explained the nature and structure of the treatment program to me. The individual components of treatment in the list below were each identified and explained to me. My initials indicate my understanding of them. (The terms "treatment", "counseling" and "therapy" as used in this document are intended to mean the same thing).

I have completed the treatment orientation outline below and understand what treatment with Patricia E. Porter consists of and what is expected and required of me so that I can graduate from the treatment program. By my signature below I acknowledge the nature and content of the treatment program. By my signature below I acknowledge the nature and content of the treatment practice by Patricia E. Porter and give consent to Patricia E. Porter to provide offender treatment and therapy as deem advisable and necessary. By my signature below I agree to participate in the form and content of the following treatment outline. I also understand that I may refuse to participate in ant or all of the components outlined below. I recognize that my doing so may, at the discretion of Patricia E. Porter, void my agreement with Patricia E. Porter and that Patricia E. Porter may exclude me from treatment as a result.

As signified by my initials, I acknowledge and agree to the following treatment limitation and requirements:

1) I am aware the practice of counseling is not an exact science and no guarantees have been made to me as a result of such counseling. /S/
2) I understand that during treatment detailed discussion regarding my social and sexual history will take place. /S/
3) I understand that throughout treatment detailed sexually graphic materials and discussions may be utilized. /S/
4) I understand that throughout treatment Patricia E. Porter will ask me to discuss the subject of my current sexual behavior as

part of the therapeutic process. In addition, I may be asked to alter certain aspects of my sexual behavior. My willingness to go along with such practices may or may not be negotiable depending on my individual circumstances. /S/

-1-

5) I understand that treatment is separate from the evaluation process. /S/
6) I understand that if I am under legal supervision that Patricia E. Porter may be required to provide periodic written and verbal reports. I will maintain an active release of information so that such reports can be made available to the supervising legal authority. These reports will become part of my permanent clinical record and will discuss progress, attendance, attitude and payment information. I understand that the information contained in these reports may influence the court's decisions regarding my status in the legal system. I understand that Patricia E. Porter may charge me, at my usual individual session rate, for any time spent preparing these reports. /S/
7) I understand that Patricia E. Porter has no duty, responsibility or legal right to defend me in a court of law. /S/
8) I understand that I will be billed by Patricia E. Porter for any testimony required of Patricia E. Porter, regarding myself, by myself or my legal counsel. /S/
9) I understand that Patricia E. Porter has sole discretion to determine in her professional opinion when treatment shall begin, be completed or terminated. This decision will be made in a reasonable and professional manner and will not be arbitrary or capricious and I will have prior notification as to when this is being considered or will occur. /S/
10) I understand that if, in the opinion of Patricia E. Porter, my situation warrents it, I may be asked to relocate and reside in an out-of-home facility, treatment center, or place of incarceration as a condition of my being accepted into treatment. /S/
11) I understand that Patricia E. Porter may require me to complete a number of plethsmograph and clinical polygraph assessments. I agree to complete these in a timely manner and at my own expense. /S/

12) Understand that, if it is believed by Patricai E. Porter to be necessary to the best possible outcome of my treatment, my spouse and/or children may be requested to undergo specialized therapy. I understand that should my spouse and/or children choose not to participate in specialized therapy that it may adversely impact my own treatment progress with Patricia E. Porter and that she, at her discretion, may terminate me from treatment. NA

13) I understand that I will be required to monitor my behavior between therapy sessions and report my behaviors and thoughts honestly and accurately at my next therapy session to Patricia E Porter. /S/

14) I understand that my continuation in treatment is based on my participation and progress in treatment and that the measure of my participation and progress is the opinion of Patricia E. Porter. /S/

15) As a condition of being accepted into treatment, I agree to be solely responsible for the treatment costs for myself. I understand that termination of treatment does not excuse me from my responsibility to pay off any moneys owed to Patricia E. Porter for services delivered. /S/

16) I understand that treatment fees are due at the time of my appointment with Patricia E. Porter unless other arrangements have been made between myself and Patricia E. Porter in advance. I understand that I must give 24 hours notice prior to any sessions that I miss. I understand that if illness forces me to miss a treatment session, that I will be charged for that session unless I provide Patricia E . Porter with a medical instruction for bed rest signed by my doctor. I understand that failure to pay may, at the discretion of Patricia E. Porter, be cause for suspension or termination from treatment. /S/

17) I understand that I may be held responsible for any treatment cost incurred by my spouse and/or children. I understand that I will only be held responsible if I have agreed to be so in advance of their treatment. /S/

18) I understand that Patricia E. Porter is compelled by laws of the State of Illinois to report information regarding child sex

abuse, suspected or known, and potential personal danger to myself or others, to outside sources without my explicit permission or consent. I have the right to have these laws explained to me at any time I request. /S/

I hereby certify that I have read this document, or have had it read to me, and agree to comply with it.

Date:: 3/16/96

Client: /S/ Douglas J. Taube

Patricia E. Porter: _____

U.S. CONSTITUTION

AMENDMENT I:

Congress shall make no law... abridging the freedom of speech.

AMENDMENT IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V:

No person shall be held to answer for a capitol , or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, SECTION 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state hall make or enforce any law which shall abridge any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of laws.

TITLE *28* - JUDICIARY AND JUDICIAL PROCEDURE

PART IV - JURISDICTION AND VENUE

CHAPTER 81 - SUPREME COURT

Sec. *1257*. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or

the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

STATE STATUTES

ILLINOIS SUPREME COURT RULES

Rule 238. Impeachment of Witnesses; Hostile Witnesses

(a) The credibility of a witness may be attacked by any party, including the party calling him.

(b) If the court determines that a witness is hostile or unwilling, he may be examined by the party calling him as if under cross-examination.

Rule 412. Disclosure to Accused

(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:

(i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion of defense counsel memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel;

(ii) any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant, and a list of witnesses to the making and acknowledgment of such statements;

(iii) a transcript of those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert;

(v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses at the hearing or trial.

If the State has obtained from the defendant, pursuant to Rule 413(d), information regarding defenses the defendant intends to make, it shall provide to defendant not less than 7 days before the date set for the hearing or trial, or at such other time as the court may direct, the names and addresses of witnesses the State intends to call in rebuttal, together with the information required to be disclosed in connection with other witnesses by subdivisions (i), (iii), and (vi), above, and a specific statement as to the substance of the testimony such witnesses will give at the trial of the cause.

(b) The State shall inform defense counsel if there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party, or of his premises.

(c) Except as is otherwise provided in these rules as to protective orders, the State shall disclose to defense counsel any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor.

(d) The State shall perform its obligations under this rule as soon as practicable following the filing of a motion by defense counsel.

(e) The State may perform these obligations in any manner mutually agreeable to itself and defense counsel or by:

(i) notifying defense counsel that material and information, described in general terms, may be inspected, obtained, tested, copied, or photographed, during specified reasonable times; and

(ii) making available to defense counsel at the time specified such material and information, and suitable facilities or other arrangements for inspection, testing, copying and photographing of such material and information.

(f) The State should ensure that a flow of information is maintained between the various investigative personnel and its office sufficient

to place within its possession or control all material and information relevant to the accused and the offense charged.

(g) Upon defense counsel's request and designation of material or information which would be discoverable if in the possession or control of the State, and which is in the possession or control of other governmental personnel, the State shall use diligent good-faith efforts to cause such material to be made available to defense counsel; and if the State's efforts are unsuccessful and such material or other governmental personnel are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to defense counsel.

(h) Discretionary Disclosures. Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court, in its discretion, may require disclosure to defense counsel of relevant material and information not covered by this rule.

(i) Denial of Disclosure. The court may deny disclosure authorized by this rule and Rule 413 if it finds that there is substantial risk to any person of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment resulting from such disclosure which outweighs any usefulness of the disclosure to counsel.

(j) Matters Not Subject to Disclosure.

(i) *Work Product.* Disclosure under this rule and Rule 413 shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the State or members of its legal or investigative staffs, or of defense counsel or his staff.

(ii) *Informants.* Disclosure of an informant's identity shall not be required where his identity is a prosecution secret and a failure to disclose will not infringe the constitutional rights of the accused. Disclosure shall not be denied hereunder of the identity of witnesses to be produced at a hearing or trial.

(iii) *National Security.* Disclosure shall not be required where it involves a substantial risk of grave prejudice to national security and where a failure to disclose will not infringe the constitutional

rights of the accused. Disclosure shall not thus be denied hereunder regarding witnesses or material to be produced at a hearing or trial.

Effective October 1, 1971; amended October 1, 1976, effective November 15, 1976; amended June 15, 1982, effective July 1, 1982.

Committee Comments

Paragraph (a). It is intended that the disclosures required by this paragraph be implemented as a matter of course, and without time-consuming recourse to the courts. The discovery is not intended to be "automatic," in the sense that the State is not required to furnish information without any request by the defense counsel. It is recognized that in many cases discovery will be neither necessary nor wanted; paragraph (a), therefore, reflects the committee's opinion that the choice of discovery or no discovery under this rule be within the discretion of defense counsel. By requiring the motion to be made in writing, rather than allowing oral motions, the committee expressed the intent that certainty was necessary in order to prevent later disputes.

Paragraph (a), subparagraph (i), enlarges upon the Code of Criminal Procedure of 1963, section 114--9(a). In addition to requiring production of a list of intended witnesses and their last known addresses (in the case of a police officer his official address shall be sufficient), the State will also be expected to produce these witnesses' prior statements. *People v. Moses*, 11 Ill. 2d 84, 142 N.E.2d 1 (1957), and decisions thereunder required the State to tender to defense counsel all such statements when the witness was tendered for cross-examination. Nothing herein changes the types of material that are to be provided; only the time of their disclosure is changed. By requiring disclosure prior to trial, it is hoped that the fruits of discovery can be harvested. Or in the event the parties have been unable to arrange a guilty plea or a dismissal, the disclosure assures defense counsel adequate time to prepare. Pretrial disclosure of this nature not only affords defense counsel adequate opportunity to investigate the case, but also ensures the end of untimely interruptions at trial occasioned by disclosures of statements at trial. The ABA standard limited production of witnesses' statements to those in written or recorded form. Paragraph (a), subparagraph (i), requires the additional production

of any substantially verbatim report of an oral statement by a witness. The State is also obliged to produce a list of all memoranda reporting or summarizing oral statements whether or not the memoranda appear to the State to be substantially verbatim reports of such statements. The defense is then entitled, upon filing of a written motion, to have the court examine the memoranda listed by the State. If the court finds that the memoranda do contain substantially verbatim reports of witness statements, the memoranda will be disclosed to defense counsel. This additional requirement serves two purposes. First, it ensures that the final responsibility for determining what is producible rests with the court. Second, it establishes, as a matter of record, the contents of the State's file with respect to reports of witness' statements and thereby facilitates appellate review of contested questions of discovery under this subsection.

Paragraph (a), subparagraph (ii), is substantially section 114--10(a) of the Code of Criminal Procedure of 1963. Because of the decision in *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1601 (1966), uncertainty as to the proper definition of "confession" exists. To ensure uniformity the committee therefore chose to make all statements, not only confessions, discoverable. The availability of all such statements will also enable defense counsel to better prepare the case. The major change in prior law is that provision which makes discoverable the prior statements, etc., of all the accused's codefendants. If an informed motion for severance or excision of a codefendant's statement to remove prejudice is to be properly made, defense counsel must be able to obtain all of the codefendant's statements.

Paragraph (a), subparagraph (iii), adopts the ABA standard for production of grand jury minutes. In terms of Illinois practice, it makes mandatory disclosure of what is now discretionary under the second sentence of section 112--6(b) of the Code of Criminal Procedure of 1963. Such full disclosure is now required in a number of other jurisdictions, including California, Iowa, Kentucky and Minnesota.

In paragraph (a), subparagraph (iv), the committee chose to adopt the standard recommended by the ABA. There should be no problem of tampering with or misuse of the information, and

without the opportunity to examine such evidence prior to trial defense counsel has the very difficult task of rebutting evidence of which he is unaware. In the interest of fairness paragraph (a), subparagraph (iv), requires the disclosure of all such results and reports, whether the result or report is "positive" or "negative," and whether or not the State intends to use the report at trial. If the State has the opportunity to view the results of any such examination, the same opportunity should enure to defense counsel. No relevancy limitation is included; the only requirement is that the examination, etc., have been made "in connection with" the case. This subparagraph, and the others in this paragraph, are intended to supplement Rule 412(c), which requires the State to disclose any results, etc., which tend to negate the guilt of the accused or would tend to reduce his punishment were he convicted.

Paragraph (a), subparagraph (v), is identical to the ABA standard for production of books, papers, documents, photographs and tangible objects.

Paragraph (a), subparagraph (vi), differs from the ABA standards in that it is limited to prior convictions which may be used for impeachment purposes in Illinois. The committee could discern no valid reason why this information should not be disclosed to the defense prior to trial when such information is in the possession or control of the State.

Paragraph (b) is included to expose for appropriate challenge an important collateral constitutional question. The nature of the exposure is designed to ensure the confidentiality of the information, and to provide flexibility in the releasing of the information, but to permit the litigation of any issues which those facts may present at a time when such litigation is most economical for the process. The necessity of the revelation of the existence of electronic surveillance has been recognized, and *in camera* hearings on the question of suppression of such evidence might be necessary. (*Alderman v. United States*, 394 U.S. 165, 22 L. Ed. 2d 176, 89 S. Ct. 961 (1969).) Because of the small number of cases in which such activity is involved, the committee chose to put the burden on the State to inform defense counsel, rather than to require the submission of a motion.

Paragraph (c) is included to comply with the constitutional requirement that the prosecution disclose, "evidence favorable to an accused *** where the evidence is material either to guilt or to punishment." (*Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218, 83 S. Ct. 1194, 1196-97 (1963).) Although the pretrial disclosure of such material is now not constitutionally required, it is clear that, if a conviction is to be valid, the material must be disclosed so that the defense can make use of it. In providing for pretrial disclosure, this paragraph permits adequate preparation for, and minimizes interruptions of, a trial, and assures informed pleas by the accused.

Paragraph (d) differs from the ABA standards only to require the State to perform its obligations as soon as is practicable following defense counsel's motion for discovery, rather than as soon as is practicable following his request for discovery. This change was made to accommodate the procedures of Rule 412(a), which require the filing of a written motion to initiate most discovery. More precision in describing the standard for performance was not deemed feasible for a rule that would be applied in such a wide variety of situations.

Paragraph (e) is designed to provide an orderly procedure for disclosure by the State. It delimits the extent of its responsibility to notifying defense counsel, only in general terms, as to the existence and availability of the material and information. The State need not send copies to defense counsel and it need not point out the significance of various items. It must, however, make the material available at specified and reasonable times, and permit--and provide suitable facilities or other arrangements for--inspection, testing, copying and photographing the material or information. If the State should desire to delay or restrict discovery it can seek a protective order therefor (Rule 415(d)) at the time of defense counsel's original motion, or at any time following. Access to material by a defense expert must be permitted, sufficient to allow him to reach conclusions regarding the State's examining or testing techniques and results. Where feasible, defense counsel should have the opportunity to have a test made by his chosen expert, either in the State's laboratory or in his own laboratory using a sufficient sample.

Paragraph (f) is designed to deal with the problem of the extent to which the State can be expected to know of the existence of material or information which it is obligated to disclose. In discharging its duties it should know, or seek to know, of the existence of material or information at least equal to that which it should disclose to defense counsel. The formulation of a rule such as this means especially that the State should not discourage the flow of information to it from investigative personnel in order to avoid having to make disclosure. Supplementing paragraph (f) are Rules 412(g), dealing with material held by other government personnel, and 415(b), dealing with the State's continuing duty to disclose new information of which it learns. The committee chose not to include a rule similar to ABA standard 2.1(d), which describes persons whose possession or control of material and information could be imputed to the prosecutor. It is assumed that this paragraph and the paragraphs cited in this comment will be sufficient to guide a court in determining if proper disclosure has been made.

Paragraph (g) is part of the attempt to delineate the scope of the State's responsibilities for obtaining information which it is obligated to disclose to defense counsel. It complements the requirement in Rule 412(F), that it ensure the flow of information between the prosecutor and investigative personnel. Since the State's obligations are not limited to revealing only what happens to come within its possession or control, it is expected that the State will attempt to obtain material not within its possession but of which it has knowledge. Accordingly, this paragraph is primarily concerned with material of which the State does not have knowledge but of which defense counsel is aware; and therefore the burden is upon defense counsel to make the request and to designate the material or information which he wishes to inspect. This paragraph avoids placing the burden on the prosecutor, in the first instance, of canvassing all governmental agencies which might conceivably possess information relevant to the defendant. Paragraph (g) is not intended to enlarge the scope of discovery but merely to deal with problems of implementation. It is, therefore, limited to material or information "which would be discoverable if in the possession or control of the State."

Paragraph (h) of this rule authorizes discovery only if the court so orders within the exercise of its discretion; discovery will only be allowed when defense counsel can show that what he seeks is material to the preparation of the defense. Though there was some opinion in the committee that the production of items and the performance of duties required in paragraphs 412(a) through (g) would result in adequate discovery in most cases, by providing for mandatory discovery the committee did not intend to bar discovery of any other matters which the defense might find useful. To deal with such a broad area, however, it is believed that the criteria here set forth and the discretionary power accorded to the court provide a satisfactory balance between the needs of the State and the needs of the defense.

Paragraph (i). Although the ABA standards combine the provisions of this paragraph with the provisions of paragraph 412(h), the committee separated the paragraphs. By separating the two paragraphs it was felt that there would be no confusion in the application of the court's right to deny disclosure. Paragraph (i) is intended not only to be used by the court in conjunction with the discretionary disclosures provided for in paragraph 412(h), but is also to be applied whenever the risks of disclosure outweigh the advantages of such disclosure to the defense or State.

Under paragraph (j), subparagraph (i), the material which is protected is primarily that which is protected from civil discovery under the doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947). But rather than merely indicate that "work product" is exempted from discovery the committee chose instead to define it in such a way as to provide guidance to those who will administer and carry out the disclosures provided for in these rules.

Paragraph (i), subparagraph (ii). The value of informants to effective law enforcement is so highly regarded that encouragement of their use, through protection of their identity, has resulted in the development of one of the few privileges accorded to the State. The public interest in protecting the sources of information concerning the commission of crimes is served by providing for the nondisclosure of the identity of informants except when compelling circumstances require it. Disclosure should only be required when constitutional problems are raised or when the informant's identity

is to be disclosed at trial (although a protective order under Rule 414(d) might still be in order). The cases which have established this privilege include *McCray v. Illinois*, 386 U.S. 300 (1967), *Roviaro v. United States*, 353 U.S. 53 (1957), *People v. White*, 16 N.Y.2d 270, 266 N.Y.S.2d 100, 213 N.E.2d 438 (1965), and *Commonwealth v. Carter* 208 Pa. Super. 245, 222 A.2d 475 (1966), aff'd mem., 209 Pa. Super. 732, 226 A.2d 215 (1967).

Paragraph (j), subparagraph (iii). While a defendant has a constitutional right to information which tends to negate his guilt or mitigate his punishment (*Brady v. Maryland*, 373 U.S. 83 (1963)), and to be confronted with the witnesses against him (*Jencks v. United States*, 353 U.S. 657 (1957)), and to any other information the withholding of which might violate his constitutional rights, he has no such right to information which does not affect his constitutional rights. This subparagraph, therefore, permits nondisclosure if disclosure would involve a substantial risk of grave prejudice to national security, and if such nondisclosure does not violate a constitutional right of the defendant. If the State intends to use the information or material at trial it should be disclosed to defendant prior to trial unless the State obtains a protective order delaying disclosure.

730 ILCS 5/5--5--3(e)(1) (West 1996).

Section 5--5--3(e)(1) of the Corrections Code provides in pertinent part:

> "In cases where prosecution for criminal sexual assault or aggravated criminal sexual abuse under Section 12--13 or 12--16 of the Criminal Code of 1961 results in conviction of a defendant who was a family member of the victim at the time of the commission of the offense, the court shall consider the safety and welfare of the victim and may impose a sentence of probation only where:
>
> (1) the court finds (A) or (B) or both are appropriate:
>
> (A) the defendant is willing to undergo a court approved counseling program for a minimum duration of 2 years; or

(B) the defendant is willing to participate in a court approved plan including but not limited to the defendant's:

(i) removal from the household;

(ii) restricted contact with the victim;

(iii) continued financial support of the family;

(iv) restitution for harm done to the victim; and

(v) compliance with any other measures that the court may deem appropriate[.]"

735 ILCS 35 RELIGIOUS FREEDOM RESTORATION RESTORATION ACT

35/1 short title

§ 1. Short title. This Act may be cited as the Religious freedom Restoration Act.

P.A. 90-806 § 1, Dec.2, 1998

Title of ACT:

An ACT concerning religious freedom. P.A. 90-806, amendatory veto overridden and eff. Dec. 2, 1998.

35/5. Definitions

§ 5. Definitions. In this Act.

"Demonstrates" means meets the burden of going forward with the evidence and of persuaion.

"Exercise of religion" means an act or refusal to act that is substantially motivated by religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.

"Government" includes a branch, department, agency, instrumentality, and official(or other person acting under under color of law) of the State of Illinois or a political subdivision of the State, including a home rule unit.

P.A. 90-806, § 5, eff. Dec. 2, 1998.

35/10. Findings and purposes

§ 10. Findings and purposes.

(a) The General Assembly finds the following:

(1) The free exercise of religion is an inherent, fundamental, and inalienable right secured by Article I, Section 3 of the Constitution of the State of Illinois.

(2) Laws "neutral" toward religion, as well as laws intended to interfere with the exercise of religion, may burden the exercise of religion.

(3) Government should not substantially burden the exercise of religion without compelling justification.

(4) In Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement under the First Amendment to the United States Constitution that government justify burdens on the exercise of religion imposed by laws neutral toward religion.

(5) In City of Boerne v. P. F. Flores, 65 LW 4612 (1997) the Supreme Court held that an Act passed by Congress to address the matter of burdens placed on the exercise of religion infringed on the legislative powers reserved to the states under the Constitution of the United States.

(6) The compelling interest test, as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), is a workable test for striking sensible balances between religious liberty and competing governmental interests.

(b) The purposes of this Act are as follows:

(1) To restore the compelling interest test as set forth in Wisconsin v. Yoder, 406 U.S. 205 (1972), and Sherbert v. Verner, 374 U.S. 398 (1963), and to guarantee that a test of compelling governmental interest will be imposed on all State and local (including home rule unit) laws, ordinances, policies, procedures, practices, and governmental actions in all cases in which the free

exercise of religion is substantially burdened.

(2) To provide a claim or defense to persons whose exercise of religion is substantially burdened by government.

P.A. 90-806, § 10, eff. Dec. 2, 1998.

35/15. Free exercise of religion protected

§ 15 Free exceise of religion protected.

Government may not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, unless it demonstrates that application of the burden to the person (i) is in furtherance of a compelling governmental interest and (ii) is the least restrictive means of furthering that compelling governmental interest.

35/20. Judicial relief.

§ 20. Judicial relief.

If a person's exercise of religion has been burdened in violation of this Act, that person may assert that violation as a claim or defense in a judicial proceeding and may obtain appropriate relief against a government. A party who prevails in an action to enforce this Act against a government is entitled to recover attorney's fees and costs incurred in maintaining the claim or defense.

35/25. Application of act; home rule powers

§ 25. Application of Home rule powers.

(a) This Act applies to all State and local (including home rule unit) laws, ordinances, policies, procedures, practices, and governmental actions and their implementation, whether statutory or otherwise and whether adopted before or after the effective date of this Act.

(b) Nothing in this Act shall be construed to authorize a government to burden any religious belief.

(c) Nothing in this Act shall be construed to affect, interpret, or in any way address any of the following: (i)

that portion of the First Amendment of the United States Constitution prohibiting laws respecting the establishment of religion, (ii) the second sentence of Article I, Section 3 of the Illinois Constitution, or (iii) Article X, Section 3 of the Illinois Constitution. Granting government funding, benefits, or exemptions, to the extent permissible under the 3 constitutional provisions described in items (i), (ii), and (iii) of this subsection, does not constitute a violation of this Act. In this subsection, "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

(d) The corporate authorities of a municipality or other unit of local government may enact ordinances, standards, rules, or regulations that protect the free exercise of religion in a manner or to an extent equal to or greater than the protection provided in this Act. If an ordinance, standard, rule, or regulation enacted under the authority of this Section or under the authority of a unit of local government's home rule powers prohibits, restricts, narrows, or burdens a person's exercise of religion or permits the prohibition, restriction, narrowing, or burdening of a person's exercise of religion, that ordinance, standard, rule, or regulation is void and unenforceable as to that person if it (i) is not in furtherance of a compelling governmental interest and (ii) is not the least restrictive means of furthering that governmental interest. This subsection is a limitation under subsection (i) of Section 6 of Article VII of the Illinois Constitution on the concurrent exercise by home rule units of powers and functions exercised by the State.

P.A. 90-806, § 25, eff. Dec. 2, 1998.

35/99. Effective date

§ 99. Effective date. This Act takes effect on July 1, 1998.

P.A. 90-806, § 99, eff. Dec. 2, 1998.